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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-42

HOWARD STEVEN STROUTH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF THE WESTERN UNION TELEGRAPH COMPANY IN OPPOSITION

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Statement

Petitioner seeks review of a judgment affirming an order of the Federal Communications Commission rejecting petitioner's claims for damages (and attorneys fees) for alleged violations by Western Union of Section 605 of the Communications Act of 1934 (47 U.S.C. 605), which prohibits the divulgence or publication of telegraphic communications. Acting on petitioner's complaint pursuant to Section 207 of the Act (47 U.S.C. 207), an FCC administrative law judge and the agency's

Review Board concluded that Western Union had violated Section 605, but both the ALJ and the Review Board also found that petitioner had failed to prove any of his damage claims, including his claim for punitive damages. Petition at la-95a; 96a-127a. The FCC denied petitioner's application for full Commission review on the damages issue (see 47 CFR 1.115) and dismissed Western Union's conditional cross-application for review of the determination that Western Union violated Section 605. Petition at 128a-129a. Petitioner sought review in the Court of Appeals for the District of Columbia Circuit, which affirmed without opinion. Petition at 144a.

The circumstances surrounding petitioner's claim for damages are highly unusual. Strouth sent himself a telegram, signed "Hirschhorn", for use as evidence in a Canadian legal proceeding. Petition at 2a. He then swore out an affidavit in which he referred to the telegram as having been received from Hirschhorn and attached a copy of the telegram to his affidavit. *Ibid.* The affidavit was served on Strouth's adversaries in the Canadian litigation and filed with the Canadian Court, where it became a public document. Petition at 26a. Strouth's adversaries, disbelieving the claim that Hirschhorn had sent the telegram, made inquiries of Hirschhorn and others and then contacted Western Union to secure a file copy of the telegram and an explanation of the coding thereon. Petition at 26a-27a. Western Union employees, aware that Strouth's adversaries already were in possession of the full text of the telegram, provided the requested file copy and explanation. Petition at 27a-28a.

After Counsel for Strouth's adversaries made clear that they were aware of the circumstances surrounding the sending of the telegram, Strouth withdrew his affidavit. Petition at 30a-31a. Subsequently, the Canadian court initiated an investigation of the circumstances. Petition at 4a, n.4. Strouth then sued Western Union.

Strouth's claim for damages was based principally on allegations of (1) loss of reputation[1] and (2) losses associated with certain "projects" in which Strouth claimed to be engaged in Costa Rica and elsewhere in Latin America. See Petition at 58a. Although he claimed that the "projects" were real and that several business associates were involved (many of whom he identified as having titles of nobility),[2] none of these alleged co-venturers was called to substantiate the existence of any of the "projects." The ALJ found Strouth's own testimony "inherently incredible" and "beyond the pale of reason" (Petition at 70a, 72a) and described the

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[1]The record shows that Strouth's reputation already had been drawn into question as a result of antifraud proceedings brought by the Securities and Exchange Commission, proceedings which led to the entry of an order enjoining Strouth from violation of the securities laws. Western Union Exhibit 7 in FCC Docket No. 20831.

[2]During the course of the proceeding below Strouth petitioned the Superior Court of the District of Columbia for an order changing his first name to "Baron." See, Superior Court Docket No. CA 5451-77, Application dated June 13, 1979. Strouth also identified himself as "Doctor", in reliance on two mail order degrees which he obtained as a "vanity exercise" so as to convey the impression that he was more highly educated than was in fact the case. Petition at 22a; 38a.

"projects" as "at best highly speculative" (Petition at 90a). Similarly, he found that the claim for loss of reputation was "totally without foundation and merit." Petition at 91a. Finally, he noted that Western Union's actions had not been the proximate cause of any of petitioner' alleged damages. Petition at 89a-90a.

Argument

There is no occasion for this Court to review the judgment below. The questions sought to be presented are not of general importance; basically petitioner's quarrel is with the agency's findings of fact. The District of Columbia Circuit properly recognized that there was no reason to disturb the agency's findings, and its disposition without opinion represents an appropriate exercise of that Court's established practice of declining to divert its resources to cases that involve only routine issues without substance or merit. See, *Handbook of Practice and Internal Procedure,* United States Court of Appeals for the District of Columbia Circuit (1978), p. 67. Petitioner's suggestion (Petition at pp. 13-14) that this Court should review the administrative record with respect to his various damage claims (including his claim for *nominal* damages) illustrates the absence of any substantial issue warranting review by this Court.

Petitioner's implication that the Commission disclaimed jurisdiction to consider his request for punitive damages (Petition at 18-19) is misleading. Although the administrative law judge ruled at the start of the proceedings that he lacked such jurisdiction (Petition at 130a-143a), the Commission reviewed the

ruling on an interlocutory basis. It expressly reserved judgment on the jurisdictional question and directed the ALJ to make findings of fact on the punitive damages issue. See Petition at 103a. The judge found that the evidence did not warrant an award of punitive damages. Petition at 86a-88a; 103a. On exceptions, the Commisison's Review Board made an independent appraisal of the evidence (Petition at 104a) and agreed with the ALJ (Petition at 105a). The question of the Commission's underlying authority to make an award of punitive damages was never reached (Petition at 105a-106a), and hence no such question is presented here.[3]

Also without merit is petitioner's suggestion that the Court of Appeals declined to award punitive damages because of some sort of "assurances from the government" that Western Union would be penalized. Petition at 19. The government gave no such assurances. The FCC's letter in response to Judge Wilkey's question at oral argument (Attachment C to the Petition)

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[3]It may be noted that this Court has held, under an identical statutory scheme, that persons claiming violations of the statute may not "recover what, though called damages, would really be a penalty" but are instead "limited to the pecuniary loss suffered and proved." *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 200, 206 (1913). The *Louisville & Nashville* case referred to by petitioner (Petition at 19) cites this holding with approval (242 U.S. at 291) and in no way undermines the rule against recovery of punitive damages.

makes clear that all the FCC contemplated was a further letter of inquiry to Western Union.[4] If the Court had believed that punitive damages were in order, it is difficult to comprehend how the FCC's letter deterred the Court from so ruling.

Petitioner's further contention that this Court should review the question of whether the Commission has authority to award attorneys fees is misconceived, Strouth appears to suggest (Petition at 9, 18) that he was misled by unnamed FCC staff members (a claim for which there is absolutely no record support) and that, therefore, *Western Union* should pay his attorneys fees. The logic of this position is elusive, to say the least. In any event, as petitioner recognized early in the proceedings below (see Petition at 81a), it is well settled that the Commission lacks authority to make an allowance for attorneys fees. See, e.g., *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 422-23 (1951); *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 595 (1966).

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[4]The Commission did send an inquiry to Western Union to which Western Union responded. The fact that the Commission has not taken further action presumably reflects a recognition that no further proceedings are warranted.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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